STATE OF MICHIGAN

COURT OF APPEALS

LEON PERCIVAL, SR., Plaintiff-Appellant,	UNPUBLISHED May 20, 2014
v	No. 313033 Alger Circuit Court
SHERRIE ANDREWS, Defendant-Appellee.	LC No. 2008-004824-CZ

Before: FITZGERALD, P.J., and SAAD and WHITBECK, JJ.

WHITBECK, J. (*concurring*).

I write separately to indicate that, even if plaintiff Leon Percival, Sr. stated a valid § 1983 claim against defendant Sherrie Andrews, the trial court properly dismissed the claim because Andrews was entitled to qualified immunity. I would affirm on this basis alone.

In a § 1983 action, a defendant "may invoke the defense of qualified immunity to avoid the burden of standing trial."[1] To determine whether qualified immunity applies, "a court must first determine whether a constitutional violation occurred."[2] If so, a court must then determine whether the constitutional violation involved "clearly established statutory or constitutional rights of which a reasonable person would have known."[3] For a right to be clearly established, there must be binding precedent *directly* on point.[4]

Therefore, even if a constitutional violation occurred, Andrews was entitled to qualified immunity because the alleged unlawfulness of her conduct was not "apparent in light of

[1] *Walsh v Taylor*, 263 Mich App 618, 635; 689 NW2d 506 (2004).

[2] *Manuel v Gill*, 270 Mich App 355, 367; 716 NW2d 291 (2006), aff'd in part, rev'd in part on other grounds 481 Mich 637 (2008).

[3] *In re Morden*, 275 Mich App 325, 340; 738 NW2d 278 (2007), quoting *Harlow v Fitzgerald*, 457 US 800, 818; 102 S Ct 2727; 73 L Ed 2d 396 (1982) (quotation marks omitted)

[4] *Morden*, 275 Mich App at 340.

preexisting law."[5] Under cases regarding prisoner mail (for example, *Merriweather v Zamora*) "[t]wo or three pieces of mail opened in an arbitrary or capricious way suffice to state a claim."[6]

Here, even if Andrews's alleged opening of the legal mail despite the label "Attorneys and Counselors" violated Percival's First Amendment rights, it was not clearly established or apparent that a single instance of opening legal mail without authorization could violate a prisoner's First Amendment rights. The incident here occurred in July 2007. *Merriweather* (issued in 2009) cited *Sallier*[7] (issued in 2003) and *Lavado*[8] (issued in 1993) for the proposition that "[t]wo or three pieces of mail opened in an arbitrary or capricious way suffice to state a claim."[9] And federal courts have frequently held, in unpublished decisions, that a defendant's opening of a *single* piece of legal mail does not establish a constitutional violation.[10]

Accordingly, the proposition that opening a *single* piece of a prisoner's mail could violate the prisoner's constitutional rights was not "preexisting law" when the incident here occurred. Rather, existing case law only clearly established that at least two unauthorized openings of legal mail may violate a prisoner's First Amendment rights. Percival's complaint only identified one instance of unauthorized opening of legal mail by Andrews. Percival did not contend that Andrews opened his legal mail without authorization on multiple occasions. Because Andrews's alleged conduct was not unlawful in light of clearly established preexisting law, I conclude that Andrews was entitled to qualified immunity.[11]

I would affirm on this basis.

/s/ William C. Whitbeck

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[5] *Manuel*, 270 Mich App at 374.

[6] *Merriweather v Zamora*, 569 F3d 307, 317 (CA 6, 2009). See *Stanley v Vining*, 602 F3d 767, 774 (COLE, J., concurring in part and dissenting in part) (quoting the same).

[7] *Sallier v Brooks*, 343 F3d 868, 873 (CA 6, 2003); *Sallier v Ramsey*, 142 Fed Appx 906 (CA 6, 2005) (the same case, after remand).

[8] *Lavado v Keohane*, 992 F2d 601, 609-610 (CA 6, 1993).

[9] *Merriweather v Zamora*, 569 F3d 307, 317 (CA 6, 2009).

[10] See, e.g. *Barker v Sowders*, 187 F3d 634, 634 (CA 6, 1999); *Sims v Landrum*, 170 Fed Appx 954, 957 (CA 6, 2006); *Velthuysen v Bolton*, unpublished opinion of the Western District of Michigan, issued August 23, 2011 (2011 WL 4074254); *Terrell v Hodges*, unpublished opinion of the Western District of Michigan, issued October 31, 2012 (2012 WL 5377969).

[11] See *Manuel*, 270 Mich App at 374.